78-1649

Supreme Court, U. S.
FILED
APR 19 1979
MICHAEL RODAK, JR., CLERK

NO. 78-1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA,
Plaintiff-Respondent

v.

RICHARD FRANKLIN FLEENER,
Defendant-Petitioner

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

NO. CR LV-77-141 RDF (DWW)

(Filed April 17, 1978)

UNITED STATES OF AMERICA

v.

RICHARD FRANKLIN FLEENER

On this 17th day of April, 1978 came the attorney for the government and the defendant appeared in person and by his retained attorney, Charles M. McDonald.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a jury verdict of guilty has been convicted of the offense of Interference with Commerce by Extortion, in violation of Title 18 United States Code, Section 1951 as charged in the one count Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years.

THE COURT ADVISES THE DEFENDANT RE HIS APPEAL RIGHTS:

THE COURT ORDERS defendant's previous bond exonerated and sets bond on appeal at $10,000.00 Appearance bond, with 10% cash deposit:

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAVID W. WILLIAMS
David W. Williams
United States District Judge.

By: /s/ SYLVIA ROJAS
Sylvia Rojas, Deputy Clerk.

EDWARD W. KRITZMAN, Clerk
Filed April 17, 1978
Los Angeles, California

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 78-1988

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD FRANKLIN FLEENER,
Defendant-Appellant.

(Filed March 9, 1979)

O R D E R

Before: MERRILL and KENNEDY, Circuit Judges, and KING, District Judge

The panel in the above case has voted to deny the petition for rehearing. Judge Kennedy has voted to reject the suggestion for rehearing en banc and Judges Merrill and King have recommended such rejection.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 78-1988

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD FRANKLIN FLEENER,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Nevada

(Filed January 19, 1979)

MEMORANDUM

Before: MERRILL and KENNEDY, Circuit Judges,
and KING,* District Judge

Defendant-Appellant attacks his jury conviction of unlawfully attempting to obstruct interstate commerce by extorting money and property from a businessman under color of official right, in violation of 18 U.S.C. § 1951. We affirm.

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* Honorable Samuel P. King, Chief Judge, United States District Court, District of Hawaii, sitting by designation.

Defendant argues that the requisite effect on interstate commerce was not shown, and that the alleged conduct had no relation to his official duties. Inasmuch as the person victimized was an importer of oriental and Persian rugs, tapestries, and gift items, whose inventory came mostly from foreign or out-of-state suppliers, an effect on interstate commerce was adequately supported by the evidence. *United States v. Phillips,* No. 77-1283 (9th Cir. 1978), slip op. at 7, is correctly cited by the government for the proposition that "Only a de minimis effect [on interstate commerce] is necessary . . . and the effect need be only probable or potential, not actual."

Because defendant is said to have told his victim that the service to be performed by defendant would take care of any problems the victim might have with the Internal Revenue Service whereas defendant was only a county deputy tax assessor, defendant questions whether the proof brought his conduct within the phrase "under color of official right." But the service to be performed was an alteration in the appraised value of the victim's inventory, which appraisal was clearly within the ambit of defendant's official duties. Furthermore, it is not necessary under the Hobbs Act that the defendant actually have the power to perform as promised but only that the victim have a reasonable belief in defendant's power to act.

Defendant argues that the indictment was duplicitous, and that he was convicted of an offense not charged in the indictment.

Defendant relies upon *United States v. Starks,* 515 F.2d 112 (3d Cir. 1975) for the first proposition. But as defendant's own brief points out, *Starks* involved an

indictment charging both a conspiracy and an attempt under 18 U.S.C. § 1951. The indictment in this case charges only an attempt, although some details of the attempt are set out, including an allegation that money was actually paid over. The case was tried as an attempt; the judge instructed the jury that "the crime was never completed." Defendant's trial attorney had no difficulty with the language of the indictment in this regard.

Defendant relies upon *Stirone v. United States,* 361 U.S. 212 (1960), for the second proposition. But in *Stirone* the trial judge added a second ground not alleged in the indictment as a basis upon which the jury could find that there had been an effect on interstate commerce. The Hobbs Act is designed to reach "extortion" which is defined by the statute as meaning "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." While the wording of the indictment could have been improved upon, it does state that the money paid over to defendant was "to lower the property tax assessment . . . and to prevent economic loss . . .," although earlier in the indictment the payment was alleged to have been "induced under color of official right." The judge did instruct the jury that the "second element [of the alleged crime] is met if you are satisfied that the defendant attempted to induce the victim's payments in either one of two ways; either fear of economic harm to the victim or under color of official right." There was no objection to these instructions. Defendant was clearly using his official position as a springboard for inducing his victim to part with money (and a rug), and in so doing was letting his victim know what could be done to, as well as for, the victim.

Defendant urges that the trial judge's instructions were biased in favor of the government and deficient in failing to charge on the defendant's theory that the payments received by him were made voluntarily for legal and legitimate consultation services and business advice rendered and to be rendered. This interpretation of the evidence is not a theory of defense but a denial of the government's evidence. Defendant's right to argue innocence was adequately covered by the court's instructions on presumption of innocence and reasonable doubt. Taken as a whole, the instructions were standard fare for this type of case and were not specially designed to favor the government.

Defendant urges error in the manner in which two tape recordings of meetings between defendant and the victim were used at the trial. The only substantial argument put forth in this regard is that the tapes should not have been used because the quality of the recording was so poor as to make it impossible to determine what was being said, yet the jury would be impressed nevertheless. Admittedly, the tapes were not perfect, attempted transcripts of what was on the tapes were not admitted in evidence because the judge thought the written reconstruction was too speculative, the reporter made no effort to record what was being played back off the tapes, and the playing of the tapes was interrupted frequently for interpretive questions and answers while the victim was on the stand. But the tapes did provide some audible probative relevant evidence; the deficiencies in the quality of the tapes was brought to the attention of the jury by the judge; the procedure that was followed was discussed at two bench conferences; there was no objection by defendant's trial counsel.

Finally, defendant urges error because of alleged deficiencies in the record. The record as originally filed did not contain a transcript of the arraignment and plea nor of the voir dire on empanelment of the jury, although a timely request had been made to include these matters. This was an error which has since been corrected.

Three "brief" bench conferences were held without a reporter. It does not appear how defendant was in any way prejudiced by this circumstance. Applying the principles set forth in *United States v. Piascik,* 559 F.2d 545 (9th Cir. 1977), we find no reversible error here.

The reporter did not attempt to record what was coming off the tapes as they were being played. But the tapes themselves were introduced into evidence, the record indicates when the tape was being played, and the discussion during the playing of the tapes clearly indicates what portion of a tape is being discussed. There was no objection to the procedure. We find no violation of 28 U.S.C. § 753(b) here.

The polling of the jury after verdict was conducted by the clerk and reported as follows: "(The jurors were individually polled and each answered 'yes.')." While this is not a "verbatim" recordation, the argument that this alone is a basis for reversal is not supported by the authorities. *See Piascik, supra.*

The conviction and judgment below are AFFIRMED.